TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~279.~~ 88

THE FIRST NATIONAL BANK OF SOUTH BEND, PLAINTIFF IN ERROR,

vs.

CHARLES LANIER AND PARKER HANDY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF INDIANA.

FILED NOVEMBER 6, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 279.

THE FIRST NATIONAL BANK OF SOUTH BEND, PLAINTIFF IN ERROR,

vs.

CHARLES LANIER AND PARKER HANDY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

INDEX.

	Original.	Print.
Declaration	1	1
Defendants' plea	13	5
Demurrer	25	8
Joinder	26	8
Judgment	34	11
Bond	35	11
Clerk's certificate	38	12
Writ of error	39	12
Citation and service	41	13

1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house at the city of Indianapolis, in said district, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and sixty eight, before the Honorable David McDonald, judge of the district court of the United States for the district of Indiana.

CHARLES LANIER AND PARKEL HANDY
v.
THE FIRST NATIONAL BANK OF SOUTH BEND. } 1317.—Assumpsit.

Be it remembered that heretofore, to wit, on the 10th day of April, A. D. 1868, the plaintiffs, by Mess. Hendricks, Hord and Hendricks, their attorneys, filed in the office of the clerk of said court their declaration in the above-entitled cause in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, *State of Indiana, set:*

2 In the United States circuit court for the district of Indiana, May term, 1868.

Charles Lanier and Parker Handy, who are citizens of the State of New York, plaintiffs, complain of the First National Bank of South Bend, a corporation duly organized under the act of the Congress of the United States entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3rd, 1864, doing business, located, and residing at South Bend, in said State of Indiana, the stockholders and members of which corporation are all residents of said State of Indiana, defendant, in a plea of trespass on the case on promises.

For that whereas heretofore, to wit, on the 29th day of January, 1866, at the city of New York, to wit, at the district aforesaid, one Charles V. Culon, a citizen of the State of Pennsylvania, was the legal holder and owner of one hundred and fifty shares of the capital stock of said First National Bank of South Bend; and as the evidence of his title thereto he then there held two certain certificates of title thereto, commonly called stock certificates, duly made and issued to him
3 by the said defendant, sealed with its seal, and subscribed by its president and its cashier, respectively, and dated July 8th, 1865, one of which said certificates, numbered 27, was and is in the words and figures following, to wit:

"No. 27.—100 *shares First National Bank of South Bend, State of Indiana.—Shares,* $100 *each.*

"This is to certify that Charles V. Culon entitled to one hundred shares in the capital stock of the First National Bank of South Bend, transferable on the books of the bank in person or by attorney, only on the surrender of this certificate.

"South Bend, July 8th, 1865.

[SEAL OF CORP.] "THOS. S. STANFIELD, *President.*
"JNO. T. LINDSEY, *Cashier.*"

The other of which said certificates, numbered 28, was and is in the words and figures following, to wit:

"No. 28.—50 *shares First National Bank of South Bend, State of Indiana.—Shares,* $100 *each.*

"This is to certify that Charles V. Culon entitled to fifty shares in the capital stock of the First National Bank of South Bend, transferable on the books of the bank in person or by attorney, only on the surrender of this certificate.

"South Bend, July 8, 1865.

[SEAL OF CORP.] "THOS. J. STANFIELD, *President.*

4 "JNO. T. LINDSEY, *Cashier.*"

[U. S. rev. stamp.]

And being so possessed of said one hundred and fifty shares of said capital stock of said defendant, and of said stock certificates, said Charles V. Culon afterwards, to wit, on said 29th day of January, 1866, at New York, to wit, at the district aforesaid, for a valuable consideration, to wit, the sum of twenty thousand dollars, by said plaintiffs to him then and there paid and advanced, sold and assigned, to the said plaintiffs one hundred and thirty-eight shares of the said one hundred and fifty shares of said capital stock.

And said Charles V. Culon then and there, in consideration of the premises, and to the end that said plaintiffs might become invested with the legal title to said one hundred and thirty-eight shares of said stock, made and endorsed his written assignment of said two certificates respectively on the back thereof respectively, as follows, viz: On said first-named certificate, numbered 27, in the words and figures following, to wit:

"For value received, I hereby sell, transfer, and assign to

5 Charles Lanier and Parker Handy, trustees, the shares of stock within mentioned, and authorize to make the necessary transfer on the books of the bank.

"Witness my hand and seal this 29th day of January, 1866.

"C. V. CULON,

"By L. H. CULON, *his Att'y.*

"Confirmed:

[SEAL.] "C. V. CULON.

"Witnessed by—

"ALFRED T. ACKERT,

"F. BLANKENHORN, *as to C. V. Culon.*"

[U. S. rev. stamp.]

On said last-named certificate, numbered 28, in the words and figures following, to wit:

"For value received, I hereby sell, transfer, and assign to Charles Lanier and Parker Handy, trustees, thirty-eight shares of the shares of stock within mentioned, and authorize to make the necessary transfer on the books of the bank.

"Witness my hand and seal this 29th day of January, 1866.

"C. V. CULON,

"By L. H. CULON, *his Att'y.*

"Confirmed:
[SEAL.] "C. V. CULON.

"Witnessed by—
"ALFRED T. ACKERT,
"F. BLANKENHORN, *as to C. V. Culon.*"

[U. S. rev. stamp.]

And said Charles V. Culon then and there delivered said certificates so endorsed to said plaintiffs. By means of the premises the said
6 plaintiffs became the owners of said one hundred and thirty-eight shares of said capital stock, and entitled to demand and receive a legal assignment and transfer thereof to them on the books of said bank.

Said plaintiffs aver that at the time of their said purchase of said stock, and at the time of the demand of transfer thereof hereinafter mentioned, and at all times since said purchase the said stock was, and has been, and is of great value, to wit, of the value of one hundred and twenty-five dollars for each share thereof. Said plaintiffs aver that afterwards, to wit, on the 31st day of January, in the year 1866, said defendant had notice of said assignment to said plaintiffs of said stock; and that afterwards, to wit, on the 31st day of January, 1868, at the district aforesaid, they, said plaintiffs, produced to said defendant at its banking-house, at said South Bend, said two certificates of stock endorsed and assigned as aforesaid, and then and there tendered and offered to surrender said two certificates to said defendant, and then and there requested and demanded of said defendant that said
7 one hundred and thirty-eight shares of said capital stock might be transferred to them, said plaintiffs, on the books of said bank.

But the plaintiffs aver that the said defendant, disregarding its duty in that behalf, and intending to injure the plaintiffs, and to deprive them of the possession, enjoyment, and ownership of said one hundred and thirty-eight shares of stock, did not, nor would, when so required as aforesaid, nor at any time before or since that time, transfer, or cause or permit to be transferred, on said books of said bank said shares of capital stock, or any part thereof, to said plaintiffs, but so to do then and there wholly failed and refused. And said plaintiffs say that said defendant, at all times since the said sale and assignment to them by said Charles V. Culon, has wholly refused and still refuses to recognize the plaintiffs as the owners of said stock, or to permit them to possess or enjoy the same, or to recover the dividends and profits thereof, by means whereof the said one hundred and thirty-eight shares of said capital stock became and are wholly lost to the plaintiffs, to the
8 damage of said plaintiffs of twenty thousand dollars; wherefore they bring suit.

2d. And for that whereas heretofore, to wit, on the 29th day of January, in the year 1866, at the district aforesaid, one Charles V. Culon, citizen of the State of Pennsylvania, was the legal holder and owner of one hundred and fifty other shares of the capital stock of said defendant; and as evidence of his title thereto then there held two certain certificates of said defendant, commonly called stock certificates, duly made and issued to him by said defendant, sealed with its seal, and dated July 8th, 1865, one of which certified and stated, among other things, that said Culon was the owner of one hundred shares of said capital stock of the defendant, and the other of which stated and certi-

fied that he was the owner of fifty shares of said capital stock, and both and each of which was transferable on the books of said bank, in person or attorney, only on the surrender of the proper certificate therefor.

And said plaintiff says that by certain by-laws of said defend-
9 ant duly adopted, and then subsisting, it was, and is, provided, in substance and effect, that shares of said capital stock of said defendant should not be transferred on the books of the bank of said defendant, except upon the surrender to the defendant of the proper certificate issued for such shares. And the said Culon being so possessed of said one hundred and fifty shares of stock, and of said certificates therefor, afterwards, to wit, on said 29th day of January, 1866, to wit, at the district aforesaid, for a valuable consideration, by said plaintiffs to him then there paid, sold to said plaintiffs one hundred and thirty-eight shares of said one hundred and fifty shares of capital stock, and then there by his endorsements upon both said certificates under his own proper hand assigned and transferred said one hundred and thirty-eight shares of said stock to the plaintiffs, and duly authorized the cashier of said bank, or any other person whom said plaintiffs might designate or appoint, as the attorney in that behalf of him, said Culon, to transfer said one hundred and thirty-eight shares of said stock to
10 said plaintiffs on the books of said bank. And said Culon then and there delivered said two stock certificates, with said assignment, and said authority to transfer, so endorsed upon each thereof to said plaintiffs. And the plaintiffs say that relying upon said by-laws, and upon said statements of said certificates, they then there purchased of and from said Culon said one hundred and thirty-eight shares of said stock, and paid to him therefore, and in consideration of said sale and assignment thereof, a large sum of money, to wit, the sum of twenty thousand dollars.

Plaintiffs say that, by means of said purchase and assignment, they became the owners of said 138 shares of capital stock, and entitled to demand and recover a legal assignment and transfer on the books of said bank; that said stock, at the time of said purchase, and at all times since, has been, and is, of the value of one hundred and twenty-five dollars for each share thereof; that said defendant had due
11 notice of said sale of said stock to the plaintiffs, to wit, on said 29th day of January, 1866.

And said plaintiffs say that afterwards, to wit, on the thirty-first day of January, in the year 1868, at the district aforesaid, they, said plaintiffs, produced to said defendant at its banking-house at said South Bend said two stock certificates endorsed and assigned as aforesaid, and then there offered to surrender the same, and demanded of said defendant that said one hundred and thirty-eight shares might be transferred to them on said books of said bank. But the plaintiffs say that said defendant, disregarding its duty in that behalf and intending to deprive the plaintiffs of the enjoyment and ownership of said shares, did not, nor would when so requested, nor at any time before or since that time, transfer or permit to be transferred said one hundred and thirty-eight shares, or any part thereof, to said plaintiffs, but so to do wholly failed and refused, and still refuse.

And they further say that at all times since their said purchase
12 of said shares said defendant has wholly failed and refused, and still refuses, to recognize the plaintiffs as the owners of said shares, or to permit them to possess the same, or to recover the dividends thereof. By means whereof the said shares became and are

wholly lost to the plaintiffs, to the damage of said plaintiffs of twenty thousand dollars; wherefore they bring suit.

HENDRICKS, HORD & HENDRICKS,
Att'ys for P'ffs.

And afterwards, to wit, at the May term of said court, on the 6th day of May, A. D. 1868, before the Honorable Judge McDonald aforesaid, the following proceedings in the cause above entitled were had, to wit:

Comes the defendant, by Mr. McDonald, its attorney, and enters an appearance to the action.

And afterwards, to wit, at the May term last aforesaid of said court, on the 11th day of June, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

13 Ordered by the court that the cause above entitled be continued.

And afterwards, to wit, at the November term of said court, on the 16th day of November, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

On motion of counsel for the plaintiff, ordered that the depositions on file be published.

And afterwards, to wit, at the November term of said court, on the 19th day of November, A. D. 1868, before the Honorable Judge McDonald aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes the defendant by its counsel and files its pleas herein in the words and figures following:

Comes now the defendant, and for a plea in this behalf says that she admits that at the time named in said declaration, to wit, the 29th day of January, 1867, the said Culon assigned the said stock certificates in said declaration described to the said plaintiffs in the manner and

14 form stated in said declaration; and that at the time named in said declaration, to wit, on the 31st day of January, 1868, the said plaintiffs produced the said certificates of stock so assigned as aforesaid, at the said defendant's banking-house, and then and offered to surrender the same to the defendant, and then and there demanded of the said defendant that the said one hundred and thirty-eight shares in said declaration mentioned should be transferred to the said plaintiffs on the books of said defendant, and that she refused so to do, as well she might, because she says that, before that time, to wit, on the 8th day of March, 1865, the said Culon, then owning and holding the said stock certificates for one hundred and fifty shares of the stock of the said bank, was a member of a banking firm in the city of New York, known by the name and style of Culon, Penn & Co., and composed of the said Charles V. Culon, John R. Penn, and Lucius H. Culon, and to induce the said defendant to make deposits in the said banking-

15 house of Culon, Penn & Co., and to secure to the said defendant any balances that might be due to her from the said banking-house of Culon, Penn & Co., the said Charles V. Culon then and there pledged the said one hundred and fifty shares of stock so held by him in the bank of said defendant to the said defendant, and then and there duly authorized and empowered one Thomas S. Stanfeld, as attorney in

fact of said Culon, at any time on the application of the board of directors of the said defendant, to sell and assign and transfer the said one hundred and fifty shares of stock so held by him as aforesaid, or any part thereof, and to apply the proceeds thereof to payment of any balance that might at the time be due and owing to the said defendant from the said banking-house of Culon, Penn & Co.; and the said defendant avers that afterwards, to wit, on the said 8th day of July, 1865, the said banking firm of Culon, Penn & Co. became and was largely indebted to this defendant on account of deposits made by the said
16 defendant with the said firm, and on account of money paid, laid out, and expended by the defendant for the use of said firm at the special instance and request of the said firm of Culon, Penn & Co., and for money loaned to the said firm, to wit, in the sum of twenty thousand dollars; and the said firm of Culon, Penn & Co. from thence so continued to be indebted to the said defendant, and was so indebted to the said defendant at the time when the said Charles V. Culon so endorsed and assigned said certificates of stock to the said plaintiff, to wit, on the said 31st day of January, 1867; and the defendant avers that afterwards, to wit, on the 20th of December, 1865, by the consent of the directors of the said First National Bank, the defendant aforesaid, the said Culon, sold fifty shares of the said stock, and by consent of the said board of directors, and in pursuance of the directors of the said Charles V. Culon, the said fifty shares of stock was assigned and transferred by the said Stanfield, the said agent of the said Culon, to
17 the purchasers thereof, (on the books of the said bank,) and the proceeds of said sale duly placed to the credit of the said firm of Culon, Penn & Co., on their indebtedness aforesaid, leaving a large balance yet due and owing to the said defendant from said Culon, Penn & Co., to wit, the sum of twenty thousand dollars; and being still so indebted, afterwards, to wit, on the 26th day of February, 1867, and before the said bank had any notice of the assignments of the said certificates of stock to the said plaintiffs, and while the said remaining one hundred shares of said stock still remained in the name of the said Charles V. Culon on the books of the said bank, the said Thomas S. Stanfield, by virtue of the authority in him vested as the agent of the Culon, for the purpose of executing the original agreement between the said bank and the said Culon, and on application of the board of directors of said bank, sold the said remaining one hundred shares of stock for the full and fair cash value thereof, to wit, for the sum of twelve thousand dollars, and then and there in due form of law assigned
18 and transferred the said stock on the books of the said bank to the purchasers thereof, and applied the proceeds thereof to the payment of the said indebtedness of the said Culon & Penn & Co. to the said bank, leaving a large balance still due and owing to said bank, to wit, the sum of ten thousand dollars, all of which she is ready to verify; wherefore she prays judgment, &c.

2. And for a further plea in this behalf the said defendant says that she admits that the said Charles V. Culver, at the time named in the said declaration, to wit, on the 31st day of January, 1867, was the owner and holder of the certificates of stock in said declaration described, and that he then and there, in manner and form as in said declaration stated, sold and assigned the same to the said plaintiff. She also admits that afterwards, to wit, on the 31st day of January, 1868, being the time named in said declaration, the said plaintiffs presented the said certificates of stock at the bank of the said defendant and offered
19 to surrender the same to the said defendants, and then and there

demanded that one hundred and thirty-eight shares of the stock named in said certificates should be duly and legally transferred on the books of said bank to the said plaintiffs, and the said defendant then and there refused to make the said transfer on the books of the said defendant, or to issue to the said plaintiffs the said one hundred shares of stock, as well she might, because she says that heretofore, to wit, on the day of , A. D. 1863, the said defendant became and was duly organized into a national banking corporation, by the corporate name and style of the First National Bank of South Bend, under and by virtue of the provisions of an act of Congress entitled "An act to provide a national currency, secured by the pledge of United States stocks, and to provide for the circulation and redemption thereof," approved February 25th, 1863, and from thence hitherto, and still is,
20 a corporation organized for banking purposes by virtue of the act aforesaid; and being so organized, the said defendant afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, the said defendant in due form ordained and established certain by-laws for her government and regulation in conducting her said business and for her protection, and to regulate the transfers of stock held in said bank, which by-laws were in pursuance of the authority vested in said bank by the act of Congress aforesaid, and the same have from the time of their said adoption remained in full force, and still are in force, unrepealed and unchanged. That by virtue of the fifteenth section of the said by-laws of said bank it was and is provided that the stock of the said bank should and shall be assignable only on the books of the said bank, subject to the provisions and restrictions of the act of Congress aforesaid. That among the provisions and restrictions of the act of Congress aforesaid on the subject of the transfer of the stock
21 of such banks as might be organized in pursuance of said act, the 36th section of said act provided that the capital stock of any association formed under said act should be divided into shares of one hundred dollars each, and should be assignable on the books of the association in such manner as its by-laws should prescribe, but no shareholder in any association formed under said act should have power to sell or transfer any share held in his own right so long as he should be liable, either as principal, debtor, surety, or otherwise, to the association for any debt which shall or should have become due and remain unpaid, nor in any case should such shareholder be entitled to receive any dividend, interest, or profit on such shares so long as such liabilities should continue, but all such dividends, interest, and profits should be retained by the associations and applied to the discharge of such liabilities, and no stock should be transferred without the consent of a majority of the directors while any shareholder thereof should be thus indebted
22 to the association. And the defendant avers that the provisions of the said section thirty-six of the act of Congress aforesaid, by the force of the by-laws of the said bank, and by virtue of the said fifteenth section of said by-laws, then and there became & was a part of the by-laws of the said bank, and regulated the transfers of the shares of stock held and owned in the same, and still is a part thereof, in full force and unrepealed by any act of said bank. And the defendant avers that before the time when the said Charles V. Culver so assigned and transferred the said stock certificates to the said plaintiffs, to wit, on the 8th day of July, 1865, and while he owned the stock named therein, to wit, at the district aforesaid, he, the said Charles V. Culver, was a member of a certain firm or copartnership in the city of New York, doing business under the firm name and style of Culver, Penn & Co.; the said

firm was composed of the said Charles V. Culver, John R. Penn, and Lucius H. Culver; and the said firm afterwards, to wit, on the
23 day and year aforesaid, at the district aforesaid, became and was largely indebted to the said defendant as follows, to wit, in the sum of twenty thousand dollars, for money then and there deposited with the said Culver, Penn & Co., by the said defendant; also the further sum of twenty thousand dollars, for money paid by the said defendant to the use of the said firm of Culver, Penn & Co., at their special instance and request; and also the further sum of twenty thousand dollars, for money loaned by the said defendant to the said Culver, Penn & Co., at their like instance and request, which said indebtedness remained and continued from the time last aforesaid & during all the said several times named in said declaration, and still exists, by means whereof the said Charles V. Culver, as a member of said firm of Culver, Penn & Co., became, and was, and still is liable to the said defendant for the said debt, and which said debt has long since become due and payable, to
24 wit, on the day and year last aforesaid, at the dist. aforesaid; wherefore the said defendant avers that by reason of said indebtedness, and by force of the said by-law of the said defendant, the said defendant had and held a lien on the said stock so owned and held by the said Charles V. Culver in the bank of the said defendant for and on account of the said money so due and owing to her as aforesaid, and still holds the said lien, and the same was in full force at the time the said certificates of stock were so assigned to the said plaintiffs and at the time the said plaintiffs presented the same to the said defendant and demanded the transfer of the said stock, as in said declaration alleged; all of which the defendant is ready to verify. Wherefore she prays judgment, &c.

McDONALD, ROACHE & McDONALD,
Att'ys for D'f't.

And, on motion of the defendant, the plaintiff is ruled to reply.

And afterwards, to wit, at the November term of said court, on
25 the 21st day of November, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come the plaintiffs, by Mr. Hendricks, their attorney, and file their demurrer to the defendant's first and second pleas.

1. And the said plaintiffs, as to the said plea of the said defendant by it firstly above pleaded, say that the same, and the matters therein contained in manner and form as the same are above pleaded, are not sufficient in law to bar or to preclude them, said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendant, and that the said plaintiffs are not bound to answer the same, and this they are ready to verify; wherefore they pray judgment, &c.

2. And as to the said plea of the said defendant by it secondly above pleaded, the said plaintiffs say that the same, and the matters therein contained in manner and form as the same are above pleaded,
26 are not sufficient in law to bar or preclude them, said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendant, and that the said plaintiffs are not bound to answer the same, and this they are ready to verify; wherefore they pray judgment, &c.

HENDRICKS, HORD & HENDRICKS,
Att'ys for P'ffs.

And the defendant joins in demurrer.

And afterwards, to wit, at the November term of said court, on the 30th day of January, A. D. 1869, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Now come the parties, by their attorneys; and upon leave of the court first had and obtained, the defendant now files a further and third plea to the action in these words and figures, to wit:

3d plea. And for a plea to so much of the declaration as claims
27 damages and demands judgment for the failure and refusal of the [of the] defendant to transfer on the books of the said defendant, thirty-eight shares of the stock in said declaration mentioned, the said defendant says that she admits the assignment of the said certificates of stock to the said plaintiff, at the time and in manner in said declaration mentioned; and that said plaintiffs, at the time and in the manner stated in said declaration, demanded the transfer of the said thirty-eight shares of stock, being part of the said one hundred shares of stock in said certificates mentioned, and that the said defendant refused to transfer the said thirty-eight shares on her books as the said plaintiff demanded, as well she might, because she says before that time, to wit, on the 8th day of March, 1865, the said Charles V. Culver, then owning and holding said certificates of stock, and being the owner of the shares of stocks therein named in the bank of the said defendant, in consideration that the said defendant would make the banking house of
28 Culver, Penn & Co., in the city of New York, of which firm the said Culver was then and there a member, her place of deposit for all such sums of money as in the course of her business she might desire to keep on deposit in said city of New York, then and there pledged the said stock in said certificates named to the said defendant for any and all such sums of money as should be so deposited by the said defendant with the said Culver, Penn & Co.; and to carry into execution said pledge, the said Culver then and there, to wit, at the district aforesaid, executed to one Thomas Stanfield a power of attorney, the date whereof was the day and year aforesaid, by he constituted the said Thomas N. Stanfield his attorney in fact, by which he authorized and empowered the said Stanfield, as such attorney in fact, to sell, assign, and dispose of any and all of such shares of stock, at such times and whenever he should be thereunto requested by the board of directors
29 of the said defendant, and apply the proceeds of such sale to the payment of any balance that might be due and owing to said defendant, from the said banking-house of Culver, Penn & Co., on account of such deposits; and the defendant avers that afterwards, to wit, on the 20th day of December, A. D. 1865, and before the said certificates had been assigned to the said plaintiffs by the said Culver, to wit, at the district, the said Culver, Penn & Co. became and were largely indebted to the said defendant, to wit, in the sum of $20,000, on account of moneys before that time deposited with them by the said defendant, at their special instance and request, and in being so indebted the said board of directors of the said defendant then and there, requested the said Stanfield to sell and dispose a part of the stock so held by the said Culver, and apply the proceeds to the payment of said indebtedness; and the said Stanfield then and there, in pursuance of said request
30 and under the authority of the said power of attorney and while the same was in full force, sold fifty shares of the said stock in said certificates mentioned, for the price and sum of five thousand dollars, that the fair cash value thereof, and then and there paid the proceeds thereof, to wit, the said $5,000 00, into the bank of the said

firm was composed of the said Charles V. Culver, John R. Penn, and Lucius H. Culver; and the said firm afterwards, to wit, on the
23 day and year aforesaid, at the district aforesaid, became and was largely indebted to the said defendant as follows, to wit, in the sum of twenty thousand dollars, for money then and there deposited with the said Culver, Penn & Co., by the said defendant; also the further sum of twenty thousand dollars, for money paid by the said defendant to the use of the said firm of Culver, Penn & Co., at their special instance and request; and also the further sum of twenty thousand dollars, for money loaned by the said defendant to the said Culver, Penn & Co., at their like instance and request, which said indebtedness remained and continued from the time last aforesaid & during all the said several times named in said declaration, and still exists, by means whereof the said Charles V. Culver, as a member of said firm of Culver, Penn & Co., became, and was, and still is liable to the said defendant for the said debt, and which said debt has long since become due and payable, to
24 wit, on the day and year last aforesaid, at the dist. aforesaid; wherefore the said defendant avers that by reason of said indebtedness, and by force of the said by-law of the said defendant, the said defendant had and held a lien on the said stock so owned and held by the said Charles V. Culver in the bank of the said defendant for and on account of the said money so due and owing to her as aforesaid, and still holds the said lien, and the same was in full force at the time the said certificates of stock were so assigned to the said plaintiffs and at the time the said plaintiffs presented the same to the said defendant and demanded the transfer of the said stock, as in said declaration alleged; all of which the defendant is ready to verify. Wherefore she prays judgment, &c.

McDONALD, ROACHE & McDONALD,
Att'ys for D'f't.

And, on motion of the defendant, the plaintiff is ruled to reply.

And afterwards, to wit, at the November term of said court, on
25 the 21st day of November, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come the plaintiffs, by Mr. Hendricks, their attorney, and file their demurrer to the defendant's first and second pleas.

1. And the said plaintiffs, as to the said plea of the said defendant by it firstly above pleaded, say that the same, and the matters therein contained in manner and form as the same are above pleaded, are not sufficient in law to bar or to preclude them, said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendant, and that the said plaintiffs are not bound to answer the same, and this they are ready to verify; wherefore they pray judgment, &c.

2. And as to the said plea of the said defendant by it secondly above pleaded, the said plaintiffs say that the same, and the matters therein contained in manner and form as the same are above pleaded,
26 are not sufficient in law to bar or preclude them, said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendant, and that the said plaintiffs are not bound to answer the same, and this they are ready to verify; wherefore they pray judgment, &c.

HENDRICKS, HORD & HENDRICKS,
Att'ys for P'ffs.

And the defendant joins in demurrer.

And afterwards, to wit, at the November term of said court, on the 30th day of January, A. D. 1869, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Now come the parties, by their attorneys; and upon leave of the court first had and obtained, the defendant now files a further and third plea to the action in these words and figures, to wit:

3d plea. And for a plea to so much of the declaration as claims
27 damages and demands judgment for the failure and refusal of the [of the] defendant to transfer on the books of the said defendant, thirty-eight shares of the stock in said declaration mentioned, the said defendant says that she admits the assignment of the said certificates of stock to the said plaintiff, at the time and in manner in said declaration mentioned; and that said plaintiffs, at the time and in the manner stated in said declaration, demanded the transfer of the said thirty-eight shares of stock, being part of the said one hundred shares of stock in said certificates mentioned, and that the said defendant refused to transfer the said thirty-eight shares on her books as the said plaintiff demanded, as well she might, because she says before that time, to wit, on the 8th day of March, 1865, the said Charles V. Culver, then owning and holding said certificates of stock, and being the owner of the shares of stocks therein named in the bank of the said defendant, in consideration that the said defendant would make the banking house of
28 Culver, Penn & Co., in the city of New York, of which firm the said Culver was then and there a member, her place of deposit for all such sums of money as in the course of her business she might desire to keep on deposit in said city of New York, then and there pledged the said stock in said certificates named to the said defendant for any and all such sums of money as should be so deposited by the said defendant with the said Culver, Penn & Co.; and to carry into execution said pledge, the said Culver then and there, to wit, at the district aforesaid, executed to one Thomas Stanfield a power of attorney, the date whereof was the day and year aforesaid, by he constituted the said Thomas N. Stanfield his attorney in fact, by which he authorized and empowered the said Stanfield, as such attorney in fact, to sell, assign, and dispose of any and all of such shares of stock, at such times and whenever he should be thereunto requested by the board of directors
29 of the said defendant, and apply the proceeds of such sale to the payment of any balance that might be due and owing to said defendant, from the said banking-house of Culver, Penn & Co., on account of such deposits; and the defendant avers that afterwards, to wit, on the 20th day of December, A. D. 1865, and before the said certificates had been assigned to the said plaintiffs by the said Culver, to wit, at the district, the said Culver, Penn & Co. became and were largely indebted to the said defendant, to wit, in the sum of $20,000, on account of moneys before that time deposited with them by the said defendant, at their special instance and request, and in being so indebted the said board of directors of the said defendant then and there, requested the said Stanfield to sell and dispose a part of the stock so held by the said Culver, and apply the proceeds to the payment of said indebtedness; and the said Stanfield then and there, in pursuance of said request
30 and under the authority of the said power of attorney and while the same was in full force, sold fifty shares of the said stock in said certificates mentioned, for the price and sum of five thousand dollars, that the fair cash value thereof, and then and there paid the proceeds thereof, to wit, the said $5,000 00, into the bank of the said

defendant, to the credit of the said Culver, Penn & Co., on their said indebtedness; and afterwards, to wit, on the 16th day of February, 1866, at the banking-house of the said defendant, at South Bend, Indiana, to wit, at the district aforesaid, the said Thomas N. Stanfield, as such attorney in fact, and in the name of said Culver, duly and regularly transferred on the books of defendant the said fifty shares of stock to the purchasers thereof, in pursuance of the said sale so made as aforesaid;

and as to the remaining one hundred shares of stock mentioned
31 in said certificates and as to the claim and demand of [of] the said plaintiff for the failure of the defendant to transfer the same as in said declaration demanded, the defendant says that she admits she refused to transfer the same, as well she might, because she says that the said [that the said] banking firm of Culver, Penn & Co., from the said 20th day of December, 1865, continued to be indebted to her in a large sum of money, to wit, in the sum of twenty thousand dollars, and in pursuance of the said agreement of the said Charles V. Culver with the said defendant, that the said stock should be held by the defendant as a security for the same, and in pursuance of the power of attorney so executed by the said Culver to the said Stanfield, and upon the request of the board of directors of the defendant made in that behalf, the said Stanfield afterwards, to wit, on the 15th day of May, 1866, at
32 South Bend, Indiana, to wit, at the district aforesaid, in by virtue of the power vested in him as attorney in fact of the said Culver, under said power of attorney, sold the said remaining one hundred shares of the stock in said certificates mentioned, for the sum of $10,000, that being its full value, and then and there, in the name of the said Culver, and as [as] his attorney in fact, duly and regularly transferred the same on the books of the said defendant to the said purchasers, and then and there paid in the proceeds thereof, to wit, $10,000, to the defendant's bank to the credit of the said Culver, Penn & Co., all of which the defendant is ready to verify; wherefore she prays judgment, &c.

McDONALD, ROACHE & McDONALD,
Att'ys for D'f't.

And the plaintiffs now file their demurrer to said last-mentioned plea in these words, to wit:

And the said plaintiffs, as to the said plea of the said defendant
33 by it thirdly, and by leave of the court, pleaded herein, says that the said plea, and the matters and things therein contained in manner and form as the same are above therein pleaded, are not sufficient in law to bar or preclude them, said plaintiffs, from having or maintaining their aforesaid action thereof against said defendant; and this they are ready to verify; wherefore they pray judgment, &c.

HENDRICKS, HORD & HENDRICKS,
Att'ys for Pl'ffs.

And the defendant now joins in demurrer, and the cause is now submitted on said several demurrers, as is by the court taken under advisement.

And afterwards, to wit, at the November term of said court, on the 1st day of February, A. D. 1869, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by their respective attorneys, and the court be-

ing now advised touching the demurrers herein, doth sustain the
34 same to the pleas of the defendant, and the defendant now in open court declines to answer further said declaration. It is therefore considered that the plaintiffs ought to recover the damages in said declaration.

And the said parties now file their agreement in writing, submitting this cause to the court for the assessment of the damages of said plaintiffs, in the words following, to wit:

By agreement of parties, the assessment of damages in the above case is submitted to the courts. But nothing in this agreement shall affect the right of the defendant to prosecute a writ of error to the Supreme Court.

HENDRICKS, HORD AND HENDRICKS,
Att'ys for P'ffs.
M'DONALD, ROACHE & M'DONALD,
Att'ys for D'f't.

And the court doth now assess their damages at the sum of sixteen thousand seven hundred and forty-four dollars and sixty-seven cents.

It is therefore considered by the court that plaintiffs do recover of said defendant the said sum of sixteen thousand seven hundred
35 and forty-four dollars and sixty-seven cents, (16,744 67,) as also their costs in this behalf expended, taxed at $.

And afterwards, to wit, at the November term of said court, on the 6th day of February, A. D. 1869, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by their respective attorneys, and the defendant prays a writ of error herein to the Supreme Court of the United States; and the same is allowed upon the filing of a bond conditioned, according to law, in the penalty of $25,000. And thereupon the defendant filed its bond with surety, which is approved by the court. And said bond is in the words and figures following:

Know all men by these presents that we, John A. Hunicks, Charles W. Guthrie, and Thomas S. Stanfield, are held and firmly bound unto the above-named Charles Lanier and Parker Handy in the sum
36 of twenty-five thousand dollars, to be paid to the said Lanier and Handy, or their executors or administrators; to the payment of which, well and truly to be made, we bind ourselves and each of us jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals this fourth day of February, A. D. 1869.

Whereas the First National Bank of South Bend hath prosecuted a writ of error to the Supreme Court of the United States for the circuit court of the United States for the district of Indiana, to reverse the judgment rendered in the above-entitled cause by the said circuit court for the district aforesaid:

Now, therefore, the condition of the above obligation is such that if the above-named "The First National Bank of South Bend" shall prosecute her said writ of error to effect and answer all damages and costs as well as the judgment so rendered against her in the said circuit court of
37 the United States, if she shall fail to make good her plea, then this

obligation shall be void; otherwise the same be and remain in full force.

Witness our hands and seals the day and year first above written.

JOHN A. HANICKS. [SEAL.]
CHAS. W. GUTHRIE. [SEAL.]
THOS. S. STANFIELD. [SEAL.]

Sealed and delivered in the presence of—
W. G. GEORGE.

And I certify that the said parties are good for the amount named in said bond.

[SEAL.] NORMAN EDDY,
Collector 9th Dist. Ind.

Sealed and delivered in my presence, and I certify that the said parties are good for the amount named in the above bond.

Dated at South Bend, Ind., February 4th, 1869.

W. G. GEORGE, [L. S.]
U. S. Commissioner.

The foregoing bond is hereby accepted, approved, and ordered to be filed.

Feb'y 6, 1869.

DAVID McDONALD,
U. S. Dist. Judge Ind. Dist.

38 UNITED STATES OF AMERICA, *District of Indiana:*

I, John D. Howland, clerk of the circuit court of the United States in and for the circuit and district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the above-entitled cause as the same appear in my office.

In testimony whereof I do hereunto set my hand and the seal of said court, at Indianapolis, in said district, this 12th day of August, A. D. 1869.

[SEAL.] J. D. HOWLAND, *Clerk.*

39 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the seventh judicial circuit and district of Indiana, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea before you between Charles Lanier and Parker Handy, plaintiffs, and the First National Bank of South Bend, defendant, a manifest error hath happened to the great damage of the said "The First National Bank of South Bend," as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the
40 said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court

may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this day of February, A. D. 1869.

[SEAL.] Attest: J. D. HOWLAND, *Clerk.*

41 UNITED STATES OF AMERICA:

To Charles Lanier and Parker Handy, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington City on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the court for the trial of impeachments and correction of errors of the circuit court of the United States for the district of Indiana, wherein the First National Bank of South Bend is plaintiff, and you are defendants in error, and show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable David McDonald, judge of said district court, holding said circuit court in pursuance of law, this 6th day of February, A. D. 1869.

DAVID McDONALD,
U. S. Dist Judge Ind. Dist.

42 This citation duly served on us this 6th February, A. D. 1869.

HENDRICKS, HORD & HENDRICKS,
Attorneys for the Plaintiffs in the U. S. Cir. Court.

(Indorsed:) Charles Lanier et al. vs. the First National Bank of South Bend. Citation.

(Indorsement on cover:) No. 279. The First National Bank of South Bend, plaintiff in error, vs. Charles Lanier and Parker Handy. Indiana C. C. U. S.

Filed 6th November, 1869.

No. 270.

Supreme Court of the United States.

THE FIRST NATIONAL BANK OF SOUTH BEND,
Plaintiff in Error.

vs.

CHARLES LANIER AND PARKER HANDY,
Defendants in Error.

BRIEF OF McDONALD & ROACHE, FOR THE PLAINTIFF IN ERROR.

No. 279.

SUPREME COURT OF THE UNITED STATES.

THE FIRST NATIONAL BANK OF SOUTH BEND,

Plaintiff in Error,

vs.

CHARLES LANIER AND PARKER HANDY,

Defendants in Error.

BRIEF OF McDONALD & ROACHE, FOR PLAINTIFF IN ERROR.

By the declaration which is in two Counts, it appears that Charles V. Culver, (printed in many places in the record, by mistake, Culon,) on the 29th day of January, 1866, had in his possession two certificates of stock issued to him by the First National Bank of South Bend, the plaintiff in error, the one for one hundred shares, and the other for fifty shares of stock in said Bank. The certificates were each dated on the 8th day of July, 1865, and the shares were one hundred dollars each. That one hundred and thirty-eight shares of the stock mentioned in these certificates were, on the day first named, assigned by Culver to the defendants in error, for value, and ——— authorized to make the necessary transfers on the books of the Bank. That on the 31st day of January, 1866, the plaintiff in error was notified of the assignment, and on the 31st day of January, 1868, the assignees presented the certificates thus assigned to the Bank and demanded the transfer of the stock, which the Bank refused. The declaration contains the proper averments of the value of the stock, and damages are claimed for the failure and refusal of the Bank to make the transfers.

The plaintiff in error filed three pleas. In each of these, she admitted that Culver had assigned the stock certificates in the form and manner stated in the declaration; and that on the 31st day of January, 1868, the defendants in error tendered the certificates to the Bank and demanded a transfer of the stock, but the Bank refused to make the transfer.

In the first plea the refusal to make the transfer is justified on the ground that on the 8th day of March, 1865, the said Culver, then being the owner and holder of the certificates of stock mentioned in the declaration, was also a member of a banking firm in the City of New York, known by the style of Culver, Penn & Co., and to induce the plaintiff in error to make her deposits in the City of New York with the house of Culver, Penn & Co., pledged the shares of stock represented by said certificates to the said plaintiff in error for any balances that might at any time be due from the banking house of Culver, Penn & Co. on account of such deposits, and to execute such pledge, executed at the same time a power of attorney to Thomas S. Stanfield, authorizing him at any time upon the application of the Board of Directors, to sell such stock, or so much as might be necessary to settle the balances due the Bank. It is then averred that on the 8th of July, 1865, the firm of Culver, Penn & Co. became indebted to the plaintiff in error in the sum of $20,000, and so continued to be indebted up to and at the time of the assignment of the said certificates to the defendants in error, and while the stock still remained in the name of the said Culver on the books of the Bank. That on the 20th of December, 1865, by consent of the Board of Directors of said Bank, the said Culver sold fifty shares of said stock, and the same was assigned and transferred to the purchaser on the books of the Bank by Stanfield attorney in fact of Culver, and the proceeds were passed to the credit of the firm of Culver, Penn & Co., leaving a large balance still due the said Bank from said firm; and on the 26th day of February, 1867, and before the Bank had any notice of the assignment of the certificates, the said Stanfield, in execution of the original agreement between the said Culver and the plaintiff in error, and by virtue of the power of attorney executed to him by said Culver, sold the remaining shares of stock for $12,000, and applied the proceeds of such sales to pay the indebtedness of Culver, Penn & Co., and transferred said

stock on the books of the Bank to the purchaser. That the proceeds of such sales still left the firm of Culver, Penn & Co. indebted in a large amount to the said Bank.

In the second plea the plaintiff in error justifies her refusal to make the transfer demanded on the ground that in the year 1863 she became a banking corporation under the provisions of the act of Congress, approved February 25th, 1863, entitled "an act to provide a national currency," etc., * * and being so organized in the year last named, she had ordained and established certain by-laws regulating the transfer of stock held in said Bank; that said by-laws were made in pursuance of the authority vested in said Bank by the act of Congress aforesaid, and that they remained in full force. That by the fifteenth section of said by-laws, the stock of said Bank was assignable only on the books of said Bank, *subject* to the *provisions* and *restrictions* of the act of Congress aforesaid. That the thirty-sixth section of said act of Congress provided, among other things, that the capital stock of such banks should be assignable on the books of the association in such manner as its by-laws should prescribe, but no share holder in any association formed under said act should have power to sell or transfer any share held in his own right so long as he should be liable as principal debtor, surety or otherwise to the association for any debt due and unpaid, etc. It is averred that the restrictions of the above section became a part of the by-laws of the Bank by virtue of the fifteenth section of said by-laws above quoted, and so remained; and that the transfers of stock in said Bank were regulated and governed by it. That at the time the said Charles V. Culver so assigned the said certificates to the defendants in error, and for a long time prior thereto, he was a member of the firm of Culver, Penn & Co.; and that said firm was and still is largely indebted to the said plaintiff in error, for which indebtedness the said Culver, as a member of said firm was also liable; that on account of such liability, the same being due and unpaid, plaintiff in error refused to make the transfers of stock so demanded.

The third plea is substantially the same as the first, except that the sale of the fifty shares of stock alleged to have been made on the 20th day of December, 1865, embracing all of the stock in certificate No. 28, of which only thirty-eight shares

were assigned to the defendants in error, is pleaded in bar of so much of the declaration only as counts upon the refusal of the bank to transfer the thirty-eight shares so assigned; and the sale is averred to have been made by Stanfield by virtue of the power of Attorney from Culver, on the request of the Board of Directors of the Bank, and not by Culver himself, as is averred in the first plea. To the balance of the declaration, the sale of the remaining shares of stock made by Stanfield as attorney in fact of Culver, on the 15th of May, 1866, is pleaded substantially as set up in the first plea.

To each of these pleas the defendants in error filed general demurrers, which, on joinder, were sustained by the Court, and the plaintiff in error declining to answer further, judgment was rendered against her.

The errors complained of arise upon the rulings of the Court in sustaining the demurrers to these pleas. If either of the defenses of which the plaintiff in error sought to avail herself are valid, then the judgment must be reversed.

There are two distinct defenses set up in these pleas. In the first and third the Bank claimed the right to refuse to make the transfers demanded, on the ground that at the time the stock was taken by Culver he had pledged it as a security for such deposits as the Bank from time to time might make with the house of Culver, Penn & Co., of which he was a member, and to give effect to that pledge had executed a power of attorney, by which he authorized his attorney in fact to sell and transfer the stock (in certain contingencies) and apply the proceeds; and that fifty shares had actually been sold in pursuance of this agreement, and the proceeds applied, before he assigned the certificates to the defendants in error, and the remaining shares had been sold before the Bank had any notice of their assignment. It has been objected to this defense that there could be no valid pledge, inasmuch as the certificates of stock, which it is claimed are the highest evidence of title to the stock, were not taken possession of by the pledgee. In general, possession of the thing pledged by the party to whom it is pledged is necessary to constitute a valid pledge; but this rule is answered whenever the pledgee has such possession as the nature of the property will permit. But the certificates do not constitute the property: they are only muniments of title. (Cunningham v.

Ala. &c., Co., 4 Ala., 652.) The shares of stock constitute the property; these might be pledged,, and the possession, so far as such property is capable of being possessed, remains in the pledger. Angell and Ames on Corporations, § 580. This results from the nature of the property being as it is, intangible personal property, possessing more the elements of a *chose in action* than of a chattel. (Ang. & Am. on Corp., § 560.) On the other hand, certificates of stock are simply the muniments and evidences of the holders' title to a given number of shares in the property and franchises of a corporation of which he is a member.

Mechanics' Bk. vs. New York and New Haven Railroad Co., 8 Kernan, page 627.

The issuance of the certificates was not at all essential to constitute the holder an owner of the stock, and a transfer may take place without the surrender of the outstanding certificate. (Ang. & Am. on Corp., § 565.) The objection, therefore, that no valid pledge could exist as there was no actual possession of the thing pledged, is untenable.

It is further insisted that if the stock was pledged, that Culver, still holding the certificates, had the power to transfer the stock by the assignment of the certificates to a *bona fide* holder, and that such holder would take the stock free of any claim of the Bank by reason of such pledge. This would be giving the certificates a legal character they clearly do not possess. This would impress upon them the highest rights of commercial paper. In the case of the Mechanics' Bank vs. New York and New Haven R. R. Co., above cited, the Court says: "Certificates "of stock are not security for money in any respect, much less "are they negotiable securities." As muniments of title they may undoubtedly be assigned or pledged, but the *bona fide* assignee or pledgee will take them subject to all the equities that existed against the assignee. See Cunningham v. Ala. &c., Co., *supra*.

This, we contend, is the only right that was, or could be, acquired by the defendants in error by the assignment under which they claim. The assignment of the certificates, it will not be contended, transferred to them the legal title to the stock represented by them; the most that can be claimed is that they thereby acquired an equitable interest in it, and that equitable

interest must necessarily be subject to existing equities. For the rule that in a conflict between equitable rights, prior equities must prevail, would govern.

Again, it is contended that the contract under which the Bank claimed a lien on the stock was void on account of the 35th sec. of the act of Congress of June 8th, 1864.

This section prohibits any association from making any "loan "or discount on the security of the shares of its own capital stock," and it is contended that the contract set up in the first and third pleas is in violation of this provision. Now the object of the prohibition, it is quite clear, was to compel stockholders to become borrowers on the same terms as other general customers; and inasmuch as the inhibition is limited to "loans and discounts," which must be held to mean those made in the ordinary course of dealing, it can not, we think, with any fairness, be extended to such securities as might be taken for deposits in such commercial centers as the Bank might find it necessary to make for the purposes of trade and exchange, and which is clearly the character of the transaction set out in the pleas under consideration. Again, Culver could not set up the illegality of the transaction—at least so far as it had been executed—nor can his assignees. It will be seen from an examination of the pleas in question, that fifty shares of the stock had been sold and transferred and the proceeds applied, before the assignment of the certificates to the defendants in error, and the whole of it had been sold before the Bank had any notice of the assignment. If, therefore, the Court should hold that the original contract was within the meaning of the inhibition of the section referred to, as it is certainly not within the language, still at the time Culver assigned the certificates, fifty shares of the stock had already passed out of his name, in pursuance of the terms of the agreement between himself and the Bank, and by virtue of the power of attorney executed by him at the time, and the proceeds of the sale passed to the credit of the firm of which he was a member, and the balance was sold before notice of the assignment, and the avails of the whole amount of stock were insufficient to pay the debt of Culver, Penn & Co. to the Bank. To put this in a still stronger light, Culver, at the time he so assigned the certificates of stock, was the owner of but one hundred shares, and for the

sale and transfer of these, he had, more than a year before, executed a power of attorney which could not be revoked while Culver, Penn & Co. were indebted to the Bank. To vest in his assignees the right to demand that which he did not have at the time he so made the assignment, and to permit them to annul that which he had no power to revoke, would be most unjust and inequitable; and yet such is the effect of the judgment of the Court below on these pleas.

The second plea presents an entirely different question, namely: the right of the plaintiff in error to hold the stock in question until the assignor had paid or discharged his liabilities to the Bank. It will be seen that the First National Bank of South Bend, the plaintiff in error, was organized under the act of February 25, 1863, and its by-laws, which have remained unchanged, were formed under the provisions of the last-named act, and with express reference to the restrictions of the 36th section of said act. The 15th section of the by-laws, which has already been quoted and which forms a part of the plea, is as follows: "The stock of this Bank shall be "assignable "only on the books of this Bank, *subject to the restrictions and* "*provisions of the act*"—meaning the act aforesaid. Now, it is averred in the plea, and we contend the legal effect of the by-law was to incorporate into it the provisions and restrictions of the 36th section of the act of February 25th, 1863, in the same manner as if they had been set out at length in the by-law itself, and that the subsequent repeal of that section by the act of June 3d, 1864, could not operate to affect the by-law, unless the right to impose such restrictions was taken away by the subsequent act; but so far from that being the case, the 12th section of the act of 1864 expressly confers upon such associations the right, either by by-laws or in their articles of association, to prescribe the manner in which stock shall be transferable on their books. This view of the question is strengthened by reference to the repealing section of the act of 1864, by which it is "provided that such repeal shall not "affect any act done or proceedings had, or any organization, "acts or proceedings of any association organized or in process "of organization under the act aforesaid."

We do not contend that a joint stock incorporated company has at common law any *implied* lien upon the stock of a share-

holder for any demands of the corporation against him, but we do maintain that if the charter of the corporation or its by-laws, made in pursuance of charter authority, contain any such restriction, the shareholder, and all who deal with him in regard to his stock are bound by it. That where the restriction is in the charter there can of course be no question, for it is the law of its being. This Court has given full force and effect to such a charter provision in the case of the Union Bank of Georgetown vs. Laird, 2d Wheat., 390. When it is to be found only in the by-law, then we contend it becomes a matter of contract, especially if the by-law ante date the subscription, or the charter in terms confers upon such corporation the power to enact such by-law. The right to enact such a by-law may not be incident to the general and ordinary powers conferred upon corporations, but it certainly is embraced in the power to "prescribe the manner in which stock shall be transferable on "their books," especially when nothing in the charter restricts or controls such language, and when the exercise of such a right is in itself equitable and just. These positions, we think, are fully sustained by the text in Angell & Ames on Corporations, § 355, and the authorities there cited, the leading ones of which we have carefully examined, and among which we cite the following:

Child vs. Hudson Bay Co., 2d Peere Williams, 207; McDowell vs. Bank of Wilmington, 1st Har., 27; Cunningham vs. The Alabama Life &c. Co., 4th Ala., 652.

Of these, the case in Peere Williams appears to be the leading one, and the conclusions arrived at in that case are adopted and supported by the other cases above cited.

We think the defenses set up in all the pleas are available to the plaintiffs in error, and that the rulings of the Court in sustaining demurrers to them must be reversed.

McDONALD & ROACHE,

Attorneys for Plaintiff in Error.

No. 279.

Supreme Court of the United States.

THE FIRST NATIONAL BANK OF SOUTH BEND,
Plaintiff in Error.

VS.

CHARLES LANIER AND PARKER HANDY,
Defendants in Error.

Brief for the Defendants in Error.

No. 279.

Supreme Court of the United States.

THE FIRST NATIONAL BANK OF SOUTH BEND,
Plaintiff in Error.

VS.

CHARLES LANIER AND PARKER HANDY,
Defendants in Error.

Brief for the Defendants in Error.

The declaration comprises two counts; they are substantially alike. They state that on the 29th day of January, 1866, Charles V. Culver ("Culon" as in the printed transcript) was the legal owner of one hundred and fifty shares of the Capital Stock of the First National Bank of South Bend. That for this stock he held two certificates, each dated July 8th, 1865, one for one hundred shares, the other for fifty shares. The certificates represented that the stock was "transferable on the books of the bank in person, or by attorney *only on the surrender of this certificate.*" A by-law of bank contained the same provision.

On the 29th of January, 1866, Culver sold one hundred and thirty-eight of these shares to the appellees for twenty thousand dollars. At the same time he duly assigned the stock certificates and executed powers of attorney authorizing the legal transfer of the stock sold, to be made on the books of the bank. The assignment and power of attorney were indorsed on the certificates. That the certificates thus indorsed were delivered to the appellees, who still hold them. That on the 31st of January, 1866, the bank had notice of the assignment. That on the 31st of January, 1868, the appellees produced the certifi-

cates indorsed as stated at the appellant's banking house, offering to surrender the same, and demanding a transfer on the books of the Bank of the one hundred and thirty-eight shares, but that the appellant refused to make or permit the transfer, or in any manner to recognize the appellees as the owners of the stock.

The appellant, (defendant below) filed three special pleas.

THE FIRST PLEA

Admitted the assignment of the certificates; the offer to surrender them, and the demand of transfer of the one hundred and thirty-eight shares: and the refusal as stated in the declaration, and set up in avoidance that before that time, on the 8th of March, 1865, Culver was a member of a banking firm doing business in New York, under the firm name of Culver, Penn & Co. That to induce the appellant to make deposits in the house of Culver, Penn & Co., and to secure any balances, Culver pledged the same one hundred and fifty shares, and duly empowered one Thomas S. Stanfield, as attorney in fact of Culver, at any time on the application of the Directors of appellant's bank to sell and transfer the stock or any part of it, and to apply the proceeds on any balance that might be due from Culver, Penn & Co. to appellant.

That afterwards on said 8th of July, 1865, Culver, Penn & Co. became and were largely indebted to appellant on account of deposits made, money paid, and money lent, in the sum of twenty thousand dollars. That such indebtedness continued up to the time of this assignment of the shares to appellees, and up to the 31st of January, 1867. That afterwards, December 20th, 1865, Culver, with the assent of the Directors of the bank, sold fifty shares of the stock, the transfer of which, on the books of the bank was made by Stanfield, and that the proceeds were applied on the indebtedness of Culver, Penn & Co., to the bank, leaving a large balance, viz., $20,000. That afterwards, on the 26th of February, 1867, and before notice of the assignment to appellees, and while the stock still stood in the name of Culver, on the books of the bank, Stanfield, as agent of Culver, and for the purpose of executing the original agreement between Culver and the bank, on the application of the Directors, sold the remaining one hundred shares of the stock

for $12,000, its fair cash value, and in due form transferred the shares on the books of the bank to the purchaser, applying the proceeds of the sale on the indebtedness of Culver, Penn & Co. to the bank.

The essential idea of this first plea is that the bank h stock under a prior pledge.

First, We think the plea defective, because it pleads result, and not the facts constituting a pledge of the st simply avers that Culver "pledged" the stock.

The declaration shows and the plea admits, that t certificates were delivered to appellees, who still reta And the plea itself shows that the stock was not tran the bank on its books.

It affirmatively appears then that the "pledge" refe the plea was not accomplished either by transfer and c the certificates, or by regular transfer of the stock on t No form of written transfer of any kind is shown. therefore, that the record shows that there was no v of the stock.

"In the case of Cortelyou *v.* Lansing, it was showr ful examination of the old authorities, to have been and settled English Law, that *delivery* was essential and that the general property did not pass, as in th mortgage, but remained with the pawnor. The pledge of moveables, without delivery is void, as against creditors." 2 Kent's Com., 581 (m. p.)

"There is a material distinction also to be noticed between a pledge and a mortgage. A pledge or pawn, is a deposit of goods redeemable on certain terms, and either with or without a fixed period for redemption. Delivery accompanies a pledge, and is essential to its validity," 4th Kent's Com., 138 (m. p.)

Story on Bailments, secs. 287, 288.

Ward vs. Sumner, 5 Pick. 58.

Barrow vs. Paxton, 5 Johns. 258.

Wilson vs. Little, 2 Coms. 443.

In this last case a pledge of corporation stock was accomplished by actual transfer of the shares on the books of the corporation. The court held that incorporeal things, and things not susceptible of manual delivery, might be the subjects of pledge, provided the pawnors interest could be put by actual

delivery, or by written transfer into the hands or within the power of the pledgee, so as to be made available for the satisfaction of his debt.

If the subject of pledge be chattels, there must be actual delivery, or symbolical delivery, in case the property be unsusceptible of manual delivery.

In case of the pledge of corporation shares, we think the delivery should be by handing over the certificates, as the most apt and tangible representative of that species or chose in action. Or by investing the pledgee with the legal title by transfer on the books, as in Wilson vs. Little, or at least by some form of written assignment, placing the shares within the power of the pledgee.

Here nothing of the kind was done. The only act or writing appertaining to the transaction, was the execution of a power of attorney by Culver, not to the bank or to any agent of the bank, as such, but to "one Thomas S. Stanfield," as his—Culver's own agent and attorney in fact. This was but a private transaction between himself and his own agent.

Second, If the plea disclosed a valid pledge, still it fails to show any facts that would authorize a sale of the stock under the pledge.

It attempts to show that Culver pledged the stock to the bank to secure it for such *deposits*, as it might afterwards make with the New York banking house of Culver, Penn & Co. It then states that Culver, Penn & Co., afterwards became indebted to the bank in $20,000 on account of deposits made, *and on account of money lent and money paid to their use.* The plea does not claim that there was any agreement for a lien, or that the stock was to stand pledged, for money paid or money lent, but only for deposits.

It shows that the whole of the stock was sold to satisfy this aggregate indebtedness, without pretending to show what proportion of it was on account of deposits.

As against the pleader we have the right to claim that but a nominal amount of this aggregate indebtedness was for money deposited, and that the sale of the stock as made was, therefore, unauthorized.

Third, We claim, however, that any agreement for a lien, such as that relied on in this plea, no matter in what form it is made or executed, and no matter whether it comes in conflict with the rights of third persons or not, is in contravention of the organic law of the bank and void.

Sec. 35 of the National Currency Act, of June 3d, 1864, which was the law governing the bank at the date of these transactions, (13th Stats. at Large, 101) prohibits "any loan or discount on the security of the shares of its own capital stock;" also the purchasing or holding such shares unless necessary to prevent loss on a debt previously contracted in good faith; and directs that stock so purchased or acquired shall be sold or disposed of in six months, in default of which a receiver shall be appointed.

The 37th section of the National Currency Act of February 25th, 1863, contained a provision similar to the 35th section of the act of 1864, though its prohibition against the holding, by a bank, of its own stock, was less stringent. (12th Stat. at Large, 676.) But the 36th section of that act of 1863, which provides for the distribution of the stock into shares, and for its being assignable, as is provided for in section 12 of the existing act, contained this restriction, that no shareholder should have power to sell or assign his shares, so long as he should be liable to the association either as principal debtor or surety, or otherwise, for any debt that should have become due, while it remained unpaid, and that he should draw no dividends or profits while such liability continued, but that all such should be applied on the indebtedness. It also provided that while any shareholder should be thus indebted, (whether the debt was actually due or not, as we understand the section,) he could not transfer his stock without the consent of the majority of the directors.

If the act of 1863 had remained unrepealed, the duty of so construing sections 36 and 37 as that both should have the force and meaning that their language imported, might have proved a little delicate. Possibly it might have been held, taking both provisions into view, that banks should make no loan or discount on security of their own shares, but should require, from its shareholders, the same security that it exacted from strangers, (section 37 expressly required this); but that after a share-

holder became indebted, his power to transfer should be conditional, not absolute, and that after the debt became actually due, his power to transfer should be absolutely suspended; that his stock should stand impounded until its dividends might satisfy the debt.

But, in the act of 1864, this restriction is wholly omitted, as also the requirement that the same security should be exacted of stockholders as of other persons.

This omission seems strongly indicative of the legislative intent. It leaves the construction of section 35, of the existing act, free from difficulty. It leaves no reason to doubt that that section means just what its language would import.

In a provision so explicit and so free from ambiguity as is section 35, as it now stands, it may hardly be necessary to look to the reason of it in seeking its true meaning. We suppose, however, that the principal reason of the provision was that the capital of the bank might, at all times, be kept in an available condition for active use. The power to loan on security of its shares would imply a power to become the owner of those shares. The practical operation of loaning or discounting, upon such security, might be the withdrawal of a part, or even all, of the actual capital of the bank. Under it, the money and other assets of the bank might be removed from its vaults, and nothing but its own certificates of shares be left remaining.

Section 35, as it now stands, guards against all tendency to such abuse.

There is only one condition upon which a bank may purchase or hold its own shares, and that is where it is necessary to do so in order to prevent loss on a debt *previously contracted in good faith.* In such case, the available capital of the bank being to that extent, already lost or imperiled, the bank, for the protection of its other shareholders, may take the stock in payment.

Another reason, influencing the enactment of this provision, may have been to guard against favoritism in putting out the funds of the bank. These banks were intended to subserve public, not mere private convenience. They were designed as public fiscal agents, not as the custodian of capital for the private benefit of favorites.

With such an organic provision as Section 35 contains, the business of the bank is less likely, than it otherwise would be,

to be carried on in the mere private interest of those controlling its funds.

Whether Section 35 be read in the light of its own language alone, or in the additional light of the reasons of its enactment, we submit that it clearly and utterly forbids the agreement for a lien on the stock, set up in the plea.

The section, in terms, prohibits loans or discounts only on security of its own shares. It does not specify deposits by that name. It was not, perhaps, contemplated that banks would become depositors. They were rather designed as depositories of funds. But a general deposit in a bank is, after all, but a species of loan. The specific money deposited, is not to be returned. It is to be repaid when called for, or as drawn against. Such a deposit is a loan, within both the letter and the spirit of the provision. It is called loan.

Fourth, But if we should concede that a pledge of the shares, valid as between Culver and the bank, was shown by the plea still the plea is bad.

A by-law of the bank provided, and the certificates on their face declared, that the shares could be transferred only upon the surrender of the certificates. It is not claimed that these certificates are strictly negotiable instruments within the law-merchant sense of that term. The courts have not yet, and possibly never may, refer them to the law-merchant, as a species of commercial paper strictly negotiable, as has occurred in the case of negotiable bonds, but they have repeatedly recognized the course of commerce in this regard, and have conceded to them much of the essential attributes of commercial paper.

The act of Congress makes this stock transferable, and confers upon the association the right to regulate the forms of transfer, and impliedly confers the right to regulate the form of certificate evidencing title to stock (secs. 8 and 12 of the act of 1864.)

This is a portion, and a valuable portion, of the franchises conferred upon the association. Facility of negotiation obviously contributes to the value of shares. The association that would avail itself of the advantages of this franchise should be held to the performance of every duty that reasonably appertains to the enjoyment of it.

In this case the bank, by by-law, and by the form of certificate adopted, made its stock certificates as nearly of the character of negotiable paper as it was practicable to make them. The certificates show that the stock was transferable on the books of the bank, but that it was transferable only on surrender of the certificates.

The appellees were fully justified in acting on the hypothesis that Culver had previously acquired the shares, for the certificates expressly certified that he owned them. They were fully justified in acting on the hypothesis that he still continued to own the shares, for he still held the certificates which showed on their face that the property they represented could not be transferred until they should be surrendered. And it was not even necessary to the protection of their rights that they should give notice to the bank, for by its own rules Culver could not transfer in the absence of the certificates, and these were in their own possession.

The precise point we are now submitting came under judgment in the Court of Appeals of New York in the New York and New Haven Railroad Company *vs.* Schuyler *et al.*, 34th N. Y., 30.

That being a final decision by the highest court of the leading commercial State of the Union, of an important controversy that had for a long time been before the courts in various forms, and that had been carefully considered by the court after argument by very eminent counsel, we feel the more satisfaction in referring to it as the authority upon which, especially, we rest his part of our argument.

Schuyler, the President and transfer agent of the company, had fraudulently made large over-issues of stock, and had also made many irregular transfers of the genuine stock, in consequence of which there were many conflicting certificates for the same stock outstanding.

The object of the suit was the cancellation of all the certificates except those representing the actual authorized stock of the company, and generally to quiet the confusion and conflict that had occurred in its stock accounts.

Among other classes of claimants interested in the controversy, there was one class occupying precisely the same relation

to the company that these appellees occupy to the First National Bank of South Bend.

That portion of the opinion of the court relating especially to this class of cases is on page 78 to 88, of the Opinion. The reasoning of the Court so fully covers this portion of the case at bar, that we beg leave to refer to that part of the Opinion.

In that case the certificates provided that the stock should be transferable "on the surrender of this certificate." In this case they provide that it shall be transferable "*only* on the surrender of this certificate." Otherwise they were similar. On the 11th of December, 1852, Surget lent money to R. & G. L. Schuyler upon security of stock certificates of the New York and New Haven Railroad Company. The certificates were assigned, with powers of attorney, just as was done in this case. Afterwards, on the 2d of September, 1853, and on the 3d of November, 1853, further loans upon similar security were made. Surget made no demand of transfer on the books, nor did he give any notice, so far as the case shows, of his claims, until in November, 1854. But in the meantime the Schuylers' had transferred all the stock to other parties, who took in good faith, and without notice of Surget's rights. At the time of that transfer to other parties, the original certificates were not surrendered, nor their absence accounted for, and the question considered was: whether upon these facts the railroad company was liable to Surget for the value of the stock.

We present two extracts from that portion of the opinion of the court above cited—

"Now, while the corporation could not give to a certificate of "this kind, *negotiability* in its legal commercial sense, it could and "did approximate to that characteristic, as nearly as legally possi- "ble, for the purpose of making its stock more valuable by the "ease with which its certificates could pass from hand to hand by "simple delivery. It was never intended to lock up those instru- "ments in the hands of the stockholders named in them, but to "give to them every practicable facility as the basis of commercial "transactions.

"And this was legitimate and proper, since it tended to en- "hance the value of the corporate franchise by making its stock "a subject of easy investment and ready convertibility.

"But it was essential to make these certificates in a form to se-

"cure public confidence, and this could only be done by making "them *solemn assurances of rights*. Hence, by its by-laws, the cor- "poration declared that the stock represented by them should "never be transferred except upon the delivery and cancellation of "the certificates; and this provision, in effect, it embodied in the "certificate itself.

"Armed with such instruments, it sent its stockholders into the "commercial world with knowledge of the established usage of "dealing on the faith of such certificates; and it addressed them "not to the stockholder himself, who had no need of the notice, "but to all men who should desire to participate in the advanta- "ges or profits of its franchise. It was to all such persons that it "assured safety in purchasing the certificate, by declaring that "the stock should only be transferred upon its surrender and can- "cellation.

"In this manner it courted and established privity between it- "self, and every holder of the certificate, by asserting that his "equitable title was safe because nobody but he could transfer the "legal title.

"It should be constantly borne in mind that the certificate now "spoken of is a valid one, representing actual stock; and upon "the transfer of such an one a privity at once springs up upon "the title he acquires, from his vendor and his equities as against "the corporation through which every assurance of the instru- "ment is addressed to him; and it is upon this principle that "Kortright *vs.* Buffalo Commercial Bank (22 Wend.) properly "stands.

"When, therefore, the original stockholder, to whom such a "certificate has been issued, comes to the corporation to transfer "the stock, its books are notice to it that the certificate has "been issued.

"The by-laws and the certificate are notice that it must be sur- "rendered before the stock can be transferred, and its non-pro- "duction is notice that it is not in possession of the party claim- "ing to transfer.

"These facts operate as notice that some other party is its "owner; and they put the corporation upon the inquiry that "would lead ordinary sagacity to the truth; and this is equivalent "in equity to actual notice of all the rights that inquiry might "develop.

* * * * * * * *

"But there is another and well settled principle upon which a "corporation that permits a transfer of stock under such circum- "stances should be held liable. It is this, that 'all duties im- "posed upon a corporation by law raise an implied promise of "performance' (Per Nelson, J., Kortright *vs.* Buffalo Commercial "Bank, 20 Wend., 91–94.) It was upon this principle that as- "sumpsit was maintained in the case just referred to, and that "Lord Mansfield denied a mandamus in The King *vs.* The Bank "of England (Doug., 523), to compel the bank to enter a transfer "of stock on its books on the ground that an action would lie for "a complete satisfaction equivalent to specific relief. 'The law "supposes that the corporation promises or undertakes to do its "duty, and subjects it to answer in a proper action for its defaults, "whether of non-feasance or mis-feasance' (3 Dane, 109; 5 id. "160.)

"In Bank of Columbia *vs.* Patterson (7 Cranch, 299, pp. 305, "306), Mr. Justice Story, in an able, learned and concise state- "ment of the powers, duties and liabilities of corporations, ob- "served that 'all duties imposed upon them by law, and all benefits "conferred at their request, raise implied promises for the enforce- "ment of which an action may well lie.' (Per Putnam, J., in "Sargeant *vs.* Franklin Insurance Company, 8 Pick. 98.)

"The action of assumpsit was brought in Kortright *vs.* the Buf- "falo Commercial Bank, for a refusal to permit a party holding "a certificate and power of attorney to transfer the stock on the "books of the bank. It was held for the purpose of sustaining "that form of action, that the law imposed the duty to permit the "transfer and raised an implied promise in favor of the party "holding the certificate that that duty should be performed. In "this case it was a duty enjoined upon the corporation by its by- "laws not to permit a transfer of the stock without the surrender "and cancellation of the certificate which it had issued.

"That duty raises a promise in favor of the holder of the cer- "tificate that it shall not be done:

"On the face of the certificate is a notice to all parties that the "instrument must be surrendered upon making a transfer, and I "think it would be straining no principle of law to say that the con- "tents of the certificate are an assurance, amounting to a promise "that this rule shall be adhered to for the benefit of the equitable

"owner of the stock. The court went much further in the *Bridge-*
"*port Bank Case*, above referred to, and held that, 'The *bona fide*
"holders of such certificates had a right to rely on the certificates
"under the circumstances, as securing to them the stock which
"they represented, against all transfers to other parties.' (30
"Conn., 270.)

"If the corporation, therefore, permitted the transfer of the
"stock, of which Surget was the equitable owner, in violation of
"its undertaking to protect his rights, the law gives him a rem-
"edy to the extent of the injury, upon the implied promise to do
"no such act to his prejudice."

The same question was considered in the Supreme Court of Connecticut, in the case of the Bridgeport Bank vs. New York and New Haven Railroad Company. (30th Conn., 270.)

In this case, also, the question seems to have undergone able and elaborate examination. The result, in that case, was the same as that to which the New York Court afterwards came.

THE SECOND PLEA

Also admitted the assignment of the stock to the appellees, the offer to surrender certificates, the demand of the transfer on the books, and the refusal, as stated in the declaration. But it set up these facts in avoidance, viz.:

That the bank was organized in the year 1863, under the National Currency Act of February 25, 1863.

That, by a by-law of the bank, duly adopted, it was provided that the stock of the bank should be assignable only on the books of the bank, subject to the provisions and restrictions of the act of Congress.

That among the provisions and restrictions of that act, the 36th section provided that the capital stock of any association formed under the act, should be assignable on the books of the bank in such a manner as its by-laws should prescribe, but no shareholder should have power to sell or transfer any share held in his own right, so long as he should be liable, either as principal debtor, surety, or otherwise, to the bank for any debt that should become due and remain unpaid; nor in any case should such shareholder be entitled to receive any dividend, interest or profit on such shares, so long as such liability should con-

tinue, but all such dividends, etc., should be retained by the bank and be applied to the discharge of such liabilities, and no stock should be transferred without the consent of a majority of the directors, while the holder should be thus indebted to the bank.

That before the assignment of the certificates by Culver to the appellees, to-wit: on the 8th day of July, 1865, and while he owned the stock, Culver was a member of the New York banking firm of Culver, Penn & Co.

That this firm on that day—July 8th, 1865—became indebted to appellant in the sum of $20,000, for money deposited with Culver, Penn & Co., also in $20,000 for money paid to the use of that firm; also in $20,000 for money lent to them, which indebtedness remains unpaid, and for the payment of which, Culver, as a member of the firm, is liable.

By means of which the appellant had a lien upon the stock, to secure the indebtedness, which lien was in full force at the time the stock was assigned to the appellees, and at the time appellant refused to permit the transfer.

This plea seems to assume that although the act of 1863 has been repealed by Congress, so far as the nation generally is concerned, yet, that this bank, by means of a by-law, keeps it in existence, so far as it is concerned.

The last section of the act of 1863, under which this bank became organized, reserves to Congress a general right to amend, alter, or repeal, (12 Stats. at Large, 682.) This reserved right was exercised, and the act of 1863 was repealed by the act of 1864. (Sec. 62, 13th Stats. at Large, 118.)

The 36th section of the first act contains the restriction upon the right of transfer, above referred to. This restrictive provision is embraced in the general repeal, and is not contained in in the act of 1864.

But the plea assumes that because, while the first act remained in force, the bank adopted a by-law providing "that the stock of the said "bank shall be assignable only on the books of the "said bank, *subject to the provisions and restrictions of the act "of Congress aforesaid*," and because the 36th section established a portion of such "provisions and restrictions," it therefore still remains the law of this particular bank. The result to which such a proposition, if allowed, might at once lead, would be important.

If a particular bank may, by by-law, retain in force, any one section of a law that Congress has repealed, it is difficult to see how much of the law it may not retain.

The reserved right of alteration and repeal might readily be rendered of no avail.

We claim, *first:* That if it was intended, by the by-law pleaded, to adopt the 36th section of the act of 1863 as a part of the by-laws of the bank, the intention was futile. That no organic law of a corporation can be adopted, or he made efficacious, as a mere by-law. It may be manually transcribed in the form of a by-law, but, after all, it is only the act of a creature, going through the vain performance of re-enacting the laws of its own existence.

It will hardly be claimed that, though void as a by-law when adopted, because it was organic law, yet that it was a by-law in abeyance, and became effective as a by-law, upon the repeal of the organic law. If it did not become a by-law when adopted, it never became such.

But we claim, *second:* That the plea does not show that the directors or stockholders ever intended to adopt "those provisions and restrictions" as a part of their by-law.

That there is nothing in the by-law, as recited in the plea, indicating that those "restrictions," etc., were enacted as laws of the corporation, because, *in their judgments, they should* be made such. They only recognize them as existing organic law, and submitted to them as laws by which they were already bound. The phrase, "subject to the provisions and restrictions of the act of Congress aforesaid," add nothing to the force of the by-laws. The legal meaning would be precisely the same without these words, for every by-law of a corporation must, necessarily, be subject "to the provisions and restrictions" of its charter.

If that fifteenth by-law could have the meaning imputed to it, it is still subject to the objections taken to the first plea founded on section 35, of the act of 1864. If that section prohibits all loans or discounts by a National Bank, on the security of its own shares, it is no more competent to create the lien by by-law, than by particular agreement.

A by-law creating a lien must, in fact, rest on agreement. It

is founded on consent of existing stockholders, and by which subsequent ones are bound. Where a loan or discount is made under a general lien, it is as impossible to say that it is not made on the security of the shares, as it would be in the case of a special agreement. It is the thing itself, and not any particular mode of doing it, that is prohibited.

THE THIRD PLEA

Is to so much of the declaration as relates to thirty-eight shares of the stock. It, like the others, admits the assignment of the certificates; the offer to surrender; and the demand of transfer on the books, and refusal; but attempts to avoid as follows:

It sets up the same arrangement by Culver, in the interest of Culver, Penn & Co., with the bank, as stated in the first plea, and the execution, by Culver, of a power of attorney to Stanfield, to dispose of the stock, as requested by the bank directors, and to apply the proceeds of its sale on any balance due from Culver, Penn & Co. This plea gives March 8th, 1865, as the date of the arrangement.

That afterwards, on the 20th of December, 1865, before appellees became the assignees of the certificates, Culver, Penn & Co. became indebted to the bank in the sum of $20,000, on account of deposits, and that the board of directors requested Stanfield to sell part of the stock, and apply the proceeds on the indebtedness. That he did, accordingly, on that day, sell thirty-eight of the shares, and apply the proceeds—$5,000—on the indebtedness.

That afterwards on the 16th of February, 1866, Stanfield, as such attorney in fact, transferred the thirty-eight shares to the purchaser, on the books of the bank.

As to the remainder of the shares, the same facts are pleaded, as set up in the first plea.

The introductory part of this plea professes to introduce a defense to so much of the declaration as relates to thirty-eight shares of the stock in controversy. But, after setting up facts assumed to be an avoidance to that extent, it follows with a plea of confession, and avoidance as to the remainder of the shares.

As the plea, though in an untechnical manner, assumes to answer the whole declaration, it is bad if the defense set up,

either as to the thirty-eight shares, or to the one hundred shares, is insufficient.

1 Chitty Plead., 523, 524.

Sterling vs. Sherwood, 20 Johns., 204.

Ethridge vs. Osborn, 12 Wend., 399.

The legal merits of each branch of this plea have already been considered in discussing the merits of the first plea. If that plea is bad, neither part of this plea is good.

The last branch or portion of the plea—that relating to the one hundred shares—is, in legal effect, just the same thing as the first plea, so far as concerns the one hundred shares, with this exception: after setting up an agreement for a pledge of the stock to secure the bank, on account of deposits to be made, it goes on to show that the entire indebtedness of Culver, Penn & Co., to the bank, on account of which the stock was subsequently sold, was on account of deposits alone. This difference existing, the second objection taken to the first plea, is inapplicable to this portion of the third plea. But all the other objections taken to the first plea are equally applicable to this branch of the third plea, and, if either one of them is well taken, this plea, or at least this portion of it, is bad.

As to the Thirty-eight Shares:

These were included in the same pledge, and were sold in the same way to satisfy the debt for which it is assumed that they were so pledged. But they were sold before the time when the appellants became the purchasers of the entire 138 shares, though the transfer on the books to the purchaser was made afterwards. The plea, however, admits, by failing to deny, that the certificate representing these thirty-eight shares, was not delivered to the purchasers under the banks lien, and that they were not surrendered at the time of the transfer on the books to those purchasers.

On the contrary, it is apparent from the pleadings that at the time of the sale to those purchasers, the certificate remained in the hands of Culver, and that at the time of the transfer on the books, they were in possession of the appellees under their purchase from Culver. It is not pretended that at the time of their purchase, the appellees had any notice whatever, that any sale or contract for sale of the thirty-eight shares had been

made, or that they had any reason whatever to doubt that Culver, who held the certificate, and in whose name the stock still stood on the books of the bank, was the absolute owner.

As to this branch also of this plea, we submit that it is subject to every objection taken to the first plea, except the second one.

As to the questions; was there in fact a pledge? Was the transaction prohibited by section 35, of the National Currency Act? they are alike in their application to the two pleas.

We will only ask leave to add a few words with a view to showing that the remaining—the fourth—objection taken to first plea is equally applicable here, and that the fact that the thirty-eight shares had already been sold, does not take the case as to them, out of the operation of the principle settled by the Court of Appeals, of New York, and the Supreme Court of Connecticut.

The claim of Ketchum and Bement, passed upon by the New York Court of Appeal, in the case in 34th N. Y., was similar in all respects to the claim of the appellants as shown in this plea, so far as it respects the thirty-eight shares, but with this additional feature. Ketchum and Bement had subsequently obtained a transfer on the books, and taken a new certificate. The stock was therefore, to that extent duplicated. The court in that, as in the Surget matter, ruled that the first transferree must hold the specific stock, and that therefore, the certificate issued to Ketchum and Bement must be cancelled. But it was held that they were entitled to recover damages on the same principle as that upon which Surget had recovered, viz.: that the company had permitted a transfer without requiring a surrender of the certificates, thus leaving it in the power of the holder, to deal with the certificates as his own. The Court say, (34th N. Y., pages 88, 89): "The case of Morris Ketchum, "and Edward Bement, survivors, etc., upon the merits presents "substantially the same question as that of Jacob Surget. The "certificates upon which they claim, are adjudged to be spurious "and void. They were issued on the 1st of July, 1854; but it "appears that they were made upon the surrender and cancel- "lation of several, other certificates long previously issued to R. "& G. L. Schuyler, and by them assigned with the power of at- "torney, duly executed in blank. The court has found that

"these last named certificates, when issued, were genuine, and "represented actual stock of the corporation standing to the "credit of the Schuylers' on its books; and that afterward and "before the transfer and issuing of the new certificates of July "1st, the stock represented by those certificates, was trans- "ferred on the books by the Schuylers' to *bona fide* purchasers.

"If the views suggested in Surget's case be sound, the certifi- "cates of July 1st, 1854, were properly set aside and ordered to be "cancelled by the court, for the stock represented or called for by "them, had become the property of other and innocent parties. "But this fact did not affect the right of these defendants to in- "sist upon compensation for the injury sustained by permitting "the transfer without the surrender of the certificates in their "possession.

"They were entitled to recover on the same grounds indicated "in Surget's case, and should have been awarded their dam- "ages."

It is claimed that this third plea, so far as concerns the thirty-eight shares, states a good defense within the rule that as between equal equities, priority governs, or the rule that where equities are equal, the legal title first acquired is paramount.

We submit, however, that neither of those equitable rules has application here. It is not here a question between the appellees and the purchaser of the shares under Stanfield's power of attorney, as to the legal ownership—as to who shall hold the specific shares. But it is a claim against the bank for damages for corporate malfeasance through which the bank negligently and wrongfully left it in power of Culver, to deal with the stock as his own, to the injury of appellants.

In the Bridgeport Bank case, in 36th Conn., above cited, the court after stating the substance of the adverse argument in that case, observes; "By the very form of these certificates, "specially prescribed, and specially adapted to the purpose of "their negotiation, and which were issued by their own agent, "and by their by-law providing that no stock represented by "such certificate, should be transferred until the certificate itself "was surrendered, they had assumed a duty far more extensive "than that which they now assert. The *bona fide* holders of "such certificates had a right to rely on the certificate, under

"the circumstances, as securing to them the stock which they "represented *against all tranfers to other parties.*"

If we were mistaken in the opinion just expressed, that the question relating to priority of equities has no application here, still we might very properly insist that the plea, as to the thirty-eight shares, shows no older or better equity in the bank, than it shows as to the remaining shares. It was not the bank, but some third person that purchased the stock. The equity of *the bank*, if any, arises out of the pledge, or lien, set up, and out of nothing else, and that lien arose, if ever, at the same time and in the same manner as to the thirty-eight shares, that it arose as to the other one hundred shares. The only distinction in fact, is that Culver's agent, shortly before the sale to appellants, contracted a sale of the thirty-eight shares to some third person, but without handing over the certificates, and without, at the time making any legal transfer on the books of the bank. Afterwards, while appellants held the certificate in good faith and for full value, the bank permitted the transfer to be made on their books to the other purchaser, without requiring a surrender of the certificate.

The plea shows a sale of the thirty-eight shares on the 20th of December, 1865, and a transfer on the books to the purchaser on the 16th of February, 1866. The appellees purchased and took an assignment of the certificates on the 29th of January, 1866.

If on the 16th of February, when the purchaser under Stanfields' power of attorney, demanded a transfer on the books, the bank had demanded a surrender of the certificates, as the cases cited show it, was its corporate duty to have done, the question would have arisen between the appellees and the purchaser, as to priority of right. But even then, as against that purchaser, the appellees might well have urged, that *as between him and them*, they held the legal title, and therefore the preferable equity, they having taken an assignment of the certificates, with a power of attorney.

In the N. Y. & N. H. R. R. Co., vs. Schuyler, 34 N. Y., above cited, the court say (page 80) "where the stock of a corporation "by its charter or by-laws, is transferable only on its books, the "purchaser who receives a certificate with power of attorney, "gets the entire title, legal and equitable, as between himself

"and his seller, with all the rights the latter possessed; but as be-"tween himself and the corporation, he acquires only an equitable "title, which they are bound to recognize, and permit to be "ripened into a legal title, when he presents himself, before any "effective transfer on the books has been made, to do the acts re-"quired by the charter or by-laws, in order to make a transfer."

In Shaw vs. Spencer, 100th Mass., 382, the plaintiff was the true equitable owner of the corporation shares, but the defendants, Spencer et al. were the transferees and holders of the certificate, their title as transferees of the certificates being junior in time to the plaintiffs title. The case which was an important one, and thoroughly examined, turned upon the fact that Spencer et al. took the stock with notice of the plaintiff's rights. There had been no transfer on the books and the question was as to the right to the specific stock. The entire argument of the court, assumes that if Spencer et al. had not been chargeable with notice of the plaintiff's claim, their title as assignees of the certificates would have been paramount.

Again, if the question had thus arisen directly between the two purchasers, the appellees might also with great justice have urged in behalf of their right to the specific stock, the fact that the adverse purchaser, from the 20th December, 1865, until after the time of their purchase, had not only permitted the stock to remain in Culver's name on the books of the bank, but that he had also left all the other indicia of ownership including the certificates, in Culver's possession. That having thus left the stock and all the indicia of its ownership in the possession of Culver, he is estopped to set up title as against any subsequent purchaser who had, in good faith, become such upon faith of Culver's apparent ownership.

If both are innocent and either must suffer it should be the purchaser of December 20th, for it was his act that left it in Culver's power, still to deal with the stock as his own.

In Calais Steam Boat Co. vs. Van Pelts, administrator, 2 Black., 372, this familiar rule of legal justice, received the recognition of this court. It was held (as expressed in the Reporter's Syllabus): "When a question arises between two inno-"cent parties, which of them shall suffer by the misconduct of "another, the loss must fall upon him who has enabled the wrong

"to be committed, and not on him who had no means of know-
"ing that it was a wrong.

"If the equitable owner of a thing has permitted another to
"hold the legal title accompanied with the usual documentary
"evidence of it, with full possession, and with declaration of
"ownership corresponding to the legal title, he can not set up
"his equity against a *bona fide* purchaser who had no notice of
"it. * * * * * * *

"The burden of proof rests upon the equitable owner, to
"show that the purchaser had notice of his rights in due time."

In the case at bar, the plea does not pretend to show that the appellees, when they bought of Culver, who held the certificates, and who appeared on the books as owner, had any notice whatever of any adverse claim to the stock.

We suggest, also, that by the settled law of the United States Courts, a sale of property, where, as here, the possession is left with the vendor, is *per se*, fraudulent and void, as against creditors or subsequent purchasers.

Hamilton vs. Russell, 1 Cranch, 309.

This principle comprehends corporation stocks equally with tangible chattels.

But, as before suggested, the question as to priority between conflicting equities, does not, as we view the case, arise here at all. The title of the adverse purchasers to the specific stock, they having obtained a transfer, is not questioned.

The gravamen of the declaration is the refusal of the bank to permit such transfer to the appellees.

The true question, as it seems to us, is this: Is the reason given for that refusal, viz.: that the shares had been transferred to other persons, sufficient?

We insist that it is not because that transfer to others was the result of corporate malfeasance and was prejudicial to the appellees.

We respectfully submit that the pleas were all bad, and that the judgment of the Court, upon the demurrers, should be affirmed.

T. A. HENDRICKS,
O. B. HORD,
A. W HENDRICKS,
Attorneys for Appellees.